BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for a Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E).	))))))	Case No. 20-0680-EL-UNC

INITIAL COMMENTS OF INTERSTATE GAS SUPPLY, INC.

PUBLIC VERSION

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I. INTRODUCTION

In 2011, AES Corporation ("AES") purchased DPL, Inc. ("DPL") and its subsidiaries including The Dayton Power and Light Company ("DP&L"), paying a substantial premium financed by debt that was pushed down to DPL.[1] DPL's debt load is financed primarily through the cash generated by DP&L. Testimony of R. Jeffrey Malinak at 19 ("Malinak Testimony"). Since the purchase and faced with the loss of its generation business to competition, DP&L has repeatedly come before the Public Utilities Commission of Ohio ("Commission") seeking to continue a charge originally designed to cover the risk associated with using its owned and operated generation facilities to serve its default service obligation.[2] Although the Commission has bailed out DPL by authorizing nonbypassable riders first continuing and then increasing the nonbypassable RSC under new names, the Service Stability Rider ("SSR") and the Distribution Modernization Rider

[1] AES to Acquire DPL, Businesswire (Apr. 20, 2011), viewed at http://www.businesswire.com/news/home/20110419007444/en/AES-Acquire-DPL and Press Release, AES Finalizes Acquisition of DPL Inc, (Nov. 28, 2011), viewed at https://www.aes.com/investors/press-releases/pres-Inc/Press-release-details/2011/AES-Finalizes-Acquistion-of-DPL/default.aspx.

[2] In DP&L's first standard service offer case, the Commission approved a settlement that continued the RSC. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 08-1094-EL-SSO, et al., Opinion and Order (June 24, 2009) ("ESP I"). In DP&L's second ESP case, the Commission approved a new rider, the Service Stability Rider, that increased the nonbypassable charge that replaced the RSC. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO, et al., Opinion and Order (Sept. 3, 2013) (*ESP II*). The Court reversed the authorization. *In re Application of Dayton Power and Light Co.*, 147 Ohio St. 3d 166 (June 20, 2016). In DP&L's third ESP case, the Commission approved a Distribution Modernization Rider ("DMR") designed to collect $105 million annually. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 16-395-EL-SSO, et al., Opinion and Order (Oct. 20, 2017) ("ESP III"). After the Supreme Court of Ohio reversed a similar rider approved for another electric distribution utility, the Commission terminated the DMR. *Id.,* Supplemental Opinion and Order (Nov. 21, 2019).

("DMR"), the Supreme Court of Ohio has consistently rejected those authorizations and the Commission's attempts to similarly prop up other utilities or their affiliates. *See ESP III*, Supplemental Opinion and Order ¶ 109. The Commission held that non-cost-based charges did not pass legal muster and terminated the most recent version of the nonbypassable charge, the DMR, in 2019. *Id.*, ¶ 110. DP&L responded by withdrawing its ESP and falling back for the second time to its first ESP, which contained the legacy RSC. *ESP III,* The Dayton Power and Light Company's Notice of Withdrawal of its Application in Case No. 16-395-EL-SSO Pursuant to R.C. 4928.143(C)(2)(a) (Nov. 26, 2019). Over the protests of intervenors and ignoring its own determination that the latest iteration of a nonbypassable charge for DP&L was unlawful, the Commission approved a revivification of the RSC. *ESP I*, Second Finding and Order ¶¶ 29-35 (Dec. 18, 2019). This latest version of a "zombie charge" now results in a wealth transfer from DP&L customers for the benefit of its intermediate parent, DPL, and ultimate parent company, AES, of approximately $78 million annually. Malinak Testimony, Ex. RJM-15A.

As part of its decision revivifying the RSC, the Commission directed DP&L and Commission staff to initiate a review of ESP I under R.C. 4928.143(E). *ESP I*, Supplemental Finding and Order ¶ 41. This division requires the Commission to determine whether ESP I is more favorable in the aggregate now and during the remaining term of the plan as compared to the expected result that would otherwise apply under R.C. 4928.142, an ESP versus MRO test. If the plan does not pass the test, the Commission may terminate the plan and impose such conditions it considers reasonable and necessary to accommodate the transition to the more advantageous alternative. R.C. 4928.143(E).

DP&L states that the ESP with the zombie RSC passes the test because it is quantitatively and qualitatively better in the aggregate than an MRO. To support its claim that the ESP is quantitatively better, DP&L adds to a hypothetical MRO a financial integrity charge that it claims would be larger than the RSC and environmental clean-up cost charges for a closed generation plant it retains following divestiture of its other generation plants. Relying on an inflated MRO, DP&L asserts that the ESP passes the ESP versus MRO test on a quantitative basis. DP&L further claims that the ESP is superior to an MRO for several qualitative reasons even with the substantial financial baggage of the RSC. Malinak Testimony at 78-84.

In its attempt to paper over the heavy losses the current ESP imposes on customers and other intervenors, DP&L grossly overstates the costs of an MRO and the benefits of the ESP. Corrected for DP&L's legal mistakes, the ESP is quantitatively worse than an MRO by at least $314 million over the next four years of the ESP. Additionally, DP&L's claim that the ESP is qualitatively better than an MRO is based on alleged benefits that are not beneficial in any meaningful sense. As a result, DP&L has not demonstrated that the ESP is better in the aggregate than an MRO.

Because the ESP fails the ESP versus MRO test, the Commission may terminate the plan and impose the better alternative, an MRO, along with such conditions as are necessary to make the transition from ESP I to an MRO. R.C. 4928.143(E). As a first step, the Commission should determine that DP&L's RSC should be terminated or at least be restructured as a bypassable charge. Additionally, the Commission should direct DP&L to wind down the other charges that are not available under an MRO so that

legitimately incurred costs under the ESP are not stranded, but this wind down should be completed within a term that does not extend unreasonably.[3]

II. THE ESP MUST BE BETTER IN THE AGGREGATE THAN AN MRO; IF THE ESP FAILS THE TEST, THE COMMISSION MAY TERMINATE THE ESP AND TRANSITION TO AN MRO

The Commission's review is governed by R.C. 4928.143(E).[4] Under that division of the Revised Code, the Commission shall review a plan that exceeds three years from its effective date to determine whether the plan, including its existing pricing and all other terms and conditions, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under an MRO under R.C. 4928.142.[5] This requirement is consistent with the public interest since it gives the Commission an opportunity to evaluate the assumptions it relied upon when it initially authorized the ESP.

The ESP and the MRO being compared can be and in this case are substantially different. While an ESP must include the provisions relating to the provision of supply and pricing of electricity, it may also include other provisions. R.C. 4928.143(B). An MRO, however, is limited to a generation supply offer that is established through a competitive bidding process supervised by the Commission. R.C. 4928.142. Additionally,

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[3] These Comments focus on the ESP versus MRO test. Interstate Gas Supply, Inc. ("IGS") reserves the right to address other issues presented in this proceeding including the review of earnings in future comments or a hearing if one is conducted.

[4] This case is the first instance in which the Commission has reviewed an ESP under R.C. 4928.143(E), but the Commission has applied a similarly worded test in R.C. 4928.143(F). Under that section, the Commission with the approval of the Supreme Court of Ohio has concluded that it may consider both quantitative and qualitative factors under the test.

[5] Under R.C. 4928.143(E), the Commission must also determine whether the prospective effect of the ESP is substantially likely to provide the electric distribution utility with a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies that face comparable business and financial risk.

the electric distribution utility in its first MRO may also adjust the price of the generation supply based on a percentage of it being priced on the prior standard service offer price. As to that portion of the generation supply, the electric distribution utility may include "[i]ts costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs." R.C. 4928.142(D)(4). "Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity." *Id.*

If the electric security plan fails the ESP versus MRO test, the Commission may terminate the plan and "impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative." R.C. 4928.143(E).

III. ESP I PROVIDES FOR A COMPETITIVELY BID ELECTRIC SUPPLY OFFER AND SEVERAL NONBYPASSABLE CHARGES

As noted previously, DP&L elected in 2019 to withdraw its ESP III application after the Commission refused to continue to authorize the DMR. As a result, DP&L is currently operating under an ESP that consists of riders approved as part of ESP I. These nonbypassable riders include the Infrastructure Investment Rider ("IIR"), a Storm Rider, and a Retail Stability Charge ("RSC") of $76 to $80 million annually.

One aspect of ESP I, however, is no longer in effect. In ESP I as it was originally approved, the electric supply charges were based on fuel and purchased power costs of DP&L, which supplied the electricity for the standard service offer. DP&L, however, has divested its generation assets and has purchased electric supply for its standard service

offer through an auction process authorized in a subsequent ESP. When DP&L withdrew ESP II and again when it withdrew ESP III, the Commission permitted DP&L to continue the competitive bidding process. *ESP III*, Second Finding and Order ¶ 28 (Dec. 18, 2019).

Under the standard supply contract that successful bidders are required to sign, the supplier takes on the supply risk for its Supplier Responsibility Share. *ESP III*, Testimony of Robert Lee, Attachment RJL-2 at 11 (Master Supply Contract) and Attachment RJL-5 at 2 (Bidding Rules) (Feb. 2, 2016). Further, the supplier must provide adequate assurance for performance that can be in several different forms. *Id*., Testimony of Robert Lee, Attachment RJL-2 at 32-50. Under this bidding process, DP&L is further protected by provisions that allow successful bidders to "step up" to the service that was to be provided by a defaulting bidder. *Id*., Testimony of Robert Lee, Attachment RJL-2 at 31.

Because DP&L secures electricity supply for the standard service offer through a competitive bidding process, a quantitative comparison of ESP I and an MRO presents DP&L with a problem. As DP&L admits, ESP I and a hypothetical MRO would have the same electric supply costs since both would be priced through the competitive bidding process. Malinak Testimony at 79. On a quantitative basis, ESP I is more expensive than an MRO, without any additional charges attached to it legally or otherwise, since ESP I includes the costs of the RSC,[6] a charge that cannot be included in an MRO. *Id*.[7]

[6] For reasons that are never explained, DP&L also examines ESP I without an RSC. Malinak Testimony at 60-65. The ESP versus MRO test requires the Commission to consider "the plan, including its existing pricing and all other terms and conditions." R.C. 4928.143(E). Under this requirement, the extended discussion of ESP I without the RSC is not relevant to the Commission's review.

[7] As discussed below, the Supreme Court of Ohio has questioned the Commission's inclusion of a financial integrity charge on the MRO side of the test. *See In re Ohio Edison Co*., 157 Ohio St. 3d 73, ¶ 37 (2019).

To avoid failing the ESP versus MRO test, DP&L advances two arguments. First, it claims that the Commission would authorize as part of an MRO a financial integrity charge greater than the RSC and the recovery of environmental costs for a generation facility that is no longer in operation. Malinak Testimony at 79-80. According to DP&L, the Commission would authorize a financial integrity charge since the electric distribution utility would face an emergency without one under an MRO. Malinak Testimony at 8 and 53-57. Its sense of an "emergency," however, is not one typically associated with the term. Rather than raising the possibility of a service failure, DP&L asserts that the Commission would impose a financial integrity charge based on "an assessment of the general financial health based on a variety of financial variables ranging from income statement items such as revenue growth, profitability, and cash flow to balance sheet items" so as to provide DP&L with sufficient funds to meet its debt obligations *and* make projected capital expenditures. Malinak Testimony at 9 and 49. At the heart of DP&L's claim is that an MRO requires a financial integrity charge to avoid "low profitability" and a lowered credit rating at DP&L (and DPL). Malinak Testimony at 50 and 53-57. To bolster DP&L's claim that credit ratings must be maintained or improved, DP&L adds a discussion regarding the relationship between credit ratings and system reliability, but then

ESP I also includes the IIR and Storm Rider, charges that cannot be recovered through an MRO. Malinak Testimony at 80. DP&L does not address the effect of these riders in the ESP versus MRO test because they "are presumably recoverable under both ESP I and a hypothetical MRO (through the MRO itself, a distribution case, or other proceeding)." Malinak Testimony at 80. Under Commission interpretation of the ESP versus MRO test, this cost could be recovered through a base rate case. Accordingly, there is no net cost associated with the charge even though base rates may be reduced as a result of another base rate case. The Commission practice that assumes that these investment costs are additive to current rates, however, is problematic because it ignores that a rate case might produce substantially different rates from those currently in effect.

undermines that claim by showing that DP&L regularly has satisfied Commission service quality standards through good days and bad. Malinak Testimony at 66-78.

As it has in the past, DP&L also invokes financial stress on DPL as a reason why the Commission would authorize a financial integrity charge. According to DP&L, its parent would face even greater "financial distress" if the Commission failed to authorize a financial integrity charge because it needs to refinance $381 million in debt in 2021 and a credit revolver in 2023. Malinak Testimony at 52.

As further justification for the current ESP and the RSC in particular, DP&L also asserts that it has a provider of last resort obligation that justifies either the RSC or a financial integrity charge. Malinak Testimony at 65-66. DP&L does not share what cost is associated with the provider of last resort obligation, claiming it is "difficult to quantify" the value of "having a financially stable provider of last resort." Malinak Testimony at 66. Even if the Commission authorized a financial integrity charge less than the RSC, however, DP&L claims that ESP I would be superior since a lower charge would adversely affect system reliability and the credit ratings of DP&L and DPL. *Id.* at 83.

In an attempt to increase the cost of the MRO further, DP&L also claims with no explanation that it would be entitled to recover environmental costs associated with the closed Hutchings generation station under an MRO. Malinak Testimony at 80.

The apparent goal of DP&L in asserting that an MRO would include a financial integrity charge and an environmental charge is to show that the MRO is more expensive than ESP I with the RSC. According to DP&L, adding the financial integrity and environmental charges to the MRO would push the quantitative cost of the MRO above that of ESP I. Malinak Testimony at 80.

As its second line of argument that ESP I passes the ESP versus MRO test, DP&L alleges that qualitative factors provide benefits sufficient to outweigh the costs of ESP I even if an MRO is less expensive than ESP I. Malinak at 13-14. Under ESP I, DP&L asserts that it would benefit from an additional capital infusion from AES, its corporate parent; ESP I would be subject to annual earnings review; continuation of ESP I provides additional flexibility since a move to an MRO is irrevocable and limits the ability of the Commission to approve new charges; continuation avoids a potential "death spiral" since current standard service offer customers will move to other generation suppliers to avoid the financial integrity charge; and ESP I would prevent rate shock under an MRO since base rate increases for infrastructure investment in lieu of recovery under the IIR would be lumpy. Malinak Testimony at 14 and 81-83.

Taken together, DP&L's claims concerning ESP I resolve to the following: ESP I is better in the aggregate than an MRO if one assumes that the Commission would approve a financial integrity charge that exceeds the current RSC in order to avoid the "emergency" of low profitability at DP&L and to prevent credit agencies from lowering the already below investment grade ratings of DPL. Further, ESP I is better than an MRO because the Commission would allow DP&L to recover the environmental clean-up costs for a closed generation station. The Commission would also favorably conclude that either the RSC or a financial integrity charge is required because DP&L, which purchases power for its standard service offer customers from third parties through a competitive bid process in which the risk of contract failure can be mitigated, suffers from some unquantifiable risk as the provider of last resort. Even if none of that were acceptable to the Commission, DP&L claims that ESP I is still better than an MRO because ESP I

exudes qualities such as greater ratemaking flexibility, i.e, DP&L can ask for additional charges to be ladled on the already overpriced ESP.

It is time for the Commission to put an end to this sort of nonsense and terminate ESP I. As this summary of DP&L's claims demonstrates, ESP I cannot pass a legitimate application of the ESP versus MRO test.

IV. DURING THE NEXT FOUR YEARS, ESP I IS QUANTITATIVELY LESS FAVORABLE THAN AN MRO

To pass the ESP versus MRO test, DP&L stacks the MRO with a financial integrity charge and a charge for environmental clean-up costs associated with the closed Hutchings facility. Those charges are not properly included in an MRO.[8] When they are removed, ESP I is quantitatively worse than an MRO.

[8] The relevant portion of R.C. 4928.142(D) provides:

> The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:
> (1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;
> (2) Its prudently incurred purchased power costs;
> (3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;
> (4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility.

A. To pass the ESP versus MRO test, DP&L bloats the MRO with a financial integrity charge

Because ESP I and an MRO would have the same generation supply costs, the included RSC charge drives the cost of ESP I above that of an MRO. That math is irrefutable. As a result, DP&L must change the math if ESP I is to survive a quantitative review. To support its claim that ESP I passes the ESP versus MRO test, DP&L bloats the MRO with a "financial integrity charge" in the range of [redacted] annually. The basis for this charge is that DP&L must avoid "low profitability" so that DP&L's credit rating (and that of DPL) does not suffer.

B. The financial integrity charge is not available to DP&L since it fails to demonstrate by clear and convincing evidence that the Commission would authorize a charge of [redacted] to address a nonexistent emergency

1. DP&L must demonstrate by clear and convincing evidence that there would be an emergency justifying the imposition of a financial integrity charge

DP&L rests its argument for an adjustment to an MRO on the emergency powers of the Commission. Under R.C. 4928.142(D), the Commission may adjust "the electric distribution utility's most recent standard service offer price by such just and reasonable amount the commission determines necessary to address any emergency that threatens the utility's financial integrity." Because the statute does not define more specifically what is necessary to show an emergency, the Commission has looked to its prior decisions in emergency rate applications filed under R.C. 4909.16 for guidance. *ESP III*, Opinion and Order ¶ 90 (Oct. 20, 2017).

R.C 4909.16 provides that the Commission may authorize emergency relief "to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission." Under the line of cases

applying R.C. 4909.16, the Commission applies several standards to guide the exercise of its authority. Initially, the existence of an emergency is a condition precedent to any grant of temporary relief. The applicant must demonstrate by clear and convincing evidence the presence of extraordinary circumstances which constitute an emergency. Emergency relief will not be granted if the request was filed merely to circumvent permanent rate relief. Further, the Commission will grant relief on a temporary basis and only for the minimum amount necessary to avert the emergency. *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service,* Case No. 88-170-EL-AIR, et al., Opinion and Order on Interim Rate Relief at 6 (Aug. 23, 1988) ("*CEI Emergency*"). Finally, the Commission must find that any increase is necessary to prevent injury to the interests of the public or of the public utility. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service,* Case No. 09-453-HT-AEM, Opinion and Order at 14 (Sept. 9, 2009) ("*Akron Thermal*").

2. DP&L fails to demonstrate an emergency would exist if the MRO lacked an adjustment increasing standard service offer rates

As a condition precedent to relief under R.C. 4909.16, the applicant must demonstrate that it faces an emergency. Although the Commission in two recent cases has focused on credit ratings to determine whether it would find an emergency warranting a charge (and DP&L itself relies on a narrowly focused claim that its credit ratings would be impaired if it were not afforded a financial integrity charge as part of an MRO, Garavaglia Testimony at 9-11), the Commission historically has considered many factors to determine whether a financial emergency exists or will exist. In the *CEI Emergency*

case, for example, CEI and Toledo Edison demonstrated that bond ratings were at the edge of investment grade. *CEI Emergency*, Opinion and Order on Interim Rate Relief at 11. Additionally, however, the utilities also showed that cash flow was negative and that they were unable to pay their bills with current receipts. *Id.* Current rates also did not reflect the substantial additions to rate base, and related expenses, associated with the operation of two nuclear power plants. *Id.* Taking these facts together, the Commission found that an emergency existed.

In a case involving Akron Thermal, the Commission similarly identified several factors that demonstrated that the utility faced an emergency. *Akron Thermal*, Opinion and Order (Sept. 9, 2009). Due to the loss of a significant customer, Akron Thermal's survival was at issue. It faced the loss of 26% of its total revenue. *Id.* at 13. Cash flow was expected to be negative. *Id.* at 8. As a result, Akron Thermal would not have sufficient cash available to meet its expenses and its ability to render service would be impaired. *Id.* at 8 and 13. Again, the Commission relied on a broad picture of the financial situation to determine that an emergency existed.

DP&L falls far short of presenting clear and convincing evidence that an emergency would exist if an MRO did not include a financial integrity charge. Its proof consists of two steps. In Step One, DP&L claims that it would face a credit ratings drop that would lead to reductions in service quality. Malinak Testimony at 50-57 and 66-78. In Step Two, the Commission would approve a financial integrity charge for the same reason it did in DP&L's *ESP III* case when it cited solely the possibility that DP&L's credit rating would degrade if it did not receive a cost-free cash infusion in the form of a distribution modernization rider. Garavaglia Testimony at 10-11.

Step One of DP&L's argument apparently is its attempt to demonstrate that it would face an emergency. At best, DP&L's whole demonstration of an emergency is based on the supposition that credit ratings will drop in the absence of a financial integrity charge. The remainder of DP&L's "evidence" supporting the existence of an emergency, however, demonstrates how unlikely it is that DP&L faces or will face an emergency without such a charge.

According to DP&L, although it would not be shoveling dividends to DPL if the Commission did not authorize a financial integrity charge, DP&L would continue to have positive cash flows. Malinak Testimony at 50. Despite the lack of a financial integrity charge, AES would still contribute $150 million to DP&L. Malinak Testimony at 7. This testimony does not support a claim that there would be a financial emergency at DP&L if the Commission refused to authorize a financial integrity charge.

To cover the fact that there would be no financial emergency, DP&L trots out an old canard: service quality would be impaired if the MRO were not bloated with a financial integrity charge. According to DP&L, companies with higher credit ratings spend more on capital improvements, which apparently has a relationship with service quality. Malinak Testimony at 73 and 75. Yet, DP&L undercuts its argument by pointing out that service quality at DP&L is fine now, and it has met Commission service requirements during periods of low investment and non-investment grade credit ratings. Malinak Testimony at 74-75. The claim that service quality would be at risk simply does not tie together.

Moreover, the Commission has seen DP&L advance this "horror story" before. In *ESP III*, DP&L raised a similar claim about the relationship between investment and

service quality. When tested, however, these claims proved questionable. *ESP III*, Supplemental Post-Hearing Brief of Interstate Gas Supply, Inc. at 20-23 (May 30, 2019). Moreover, DP&L is proposing substantial investments in distribution infrastructure that would substantially increase its current distribution rate base and seeks dollar for dollar recovery of that investment through a stand-alone rider. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Plan to Modernize its Distribution Grid*, Case Nos. 18-1875-EL-GRD, *et al.,* Application at 5 (Dec. 21, 2018) (proposing capital expenditures with a nominal value of $575.8 million). Apparently DP&L is willing to make the necessary investments, and rate shock apparently is not that much of a concern to DP&L.

In summary, DP&L concedes facts demonstrating that there would be no financial emergency and its service quality "fears" are unfounded. These concessions demonstrate that DP&L has failed to provide the Commission with clear and convincing evidence that it faces or will face an emergency if the Commission fails to approve a financial integrity charge of [redacted] as part of an MRO.

Though it failed to demonstrate an emergency warranting Commission relief, DP&L nonetheless plows forward with Step Two of its argument. In Step Two, DP&L relies on the Commission's initial order in the *ESP III* decision finding that the ESP was better in the aggregate than an MRO in part because the DMR would be offset by a financial integrity charge based upon DP&L and DPL facing poor credit ratings. Garavaglia Testimony at 10-11, quoting *ESP III*, Opinion and Order ¶ 91. In essence, it asks the Commission to assume an emergency would exist if DP&L's credit ratings would suffer.

Reliance on the *ESP III* decision, however, is unwarranted. For the key finding regarding the availability of a charge in an MRO, the *ESP III* decision relies on a similar finding in a case approving a distribution modernization rider for the FirstEnergy utilities. *Id., citing In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 163 (Oct. 12, 2016). That decision, however, was reversed by the Supreme Court of Ohio because the Commission approved the rider without sufficient evidence or sound reasoning. *In re Ohio Edison Co.,* 157 Ohio St. 3d 73 ¶ 19 (2019). In turn, the Court's decision reversing the authorization of the FirstEnergy rider led the Commission to reverse its decision approving the similar rider for DP&L in *ESP III*. In summary, DP&L's argument is reduced to reliance on two decisions, neither of which the Commission currently can or does stand by.

Regardless of the legal justification, there is a more practical reason to reject DP&L's reliance on the *ESP III* decision. Essentially, DP&L is asking the Commission to again endorse a one-factor test for determining an emergency exists based on credit ratings. Such reliance would result in the Commission being held hostage to the credit rating agencies. Their actions would dictate the direction of rates, regardless of the merit of the rating decisions or the depth of the alleged emergency. The Commission's traditional view that it must find an emergency based on multiple factors established by clear and convincing evidence avoids the inherent limits of an approach based on credit ratings alone.

The approach also rests on a violation of the ring fencing the Commission has previously approved. According to DP&L, it is DPL that faces the more serious financing issues if the Commission were not to find an emergency under an MRO. Malinak Testimony at 51-52. DPL finances, however, should not be driving that finding under the corporate separation requirements. R.C. 4928.17. Indeed, DP&L in other proceedings has reported to the Commission that there is ring fencing already in place that should prevent a violation of corporate separation requirements under Ohio law. *In the Matter of the Application of The Dayton Power and Light Company to Increase its Rates for Electric Distribution Service*, Case Nos. 15-1830-EL-AIR, Schedule S-4.1 at 7 (Nov. 30, 2015). This ring fencing should ensure that DPL cannot force DP&L to make decisions that subordinate reliability and the interests of customers to the interest of DPL. Indeed, that is exactly what occurred when Oncor Electric Delivery's parent company went bankrupt.[9] It is not far-fetched to hold DP&L to the logical conclusion that these legal restrictions on misuse of DP&L's assets will prevent the credit down-grade that is the centerpiece of its claim that it will face an emergency.[10] More importantly, the Commission cannot lawfully find an emergency based on what should be the fully separated DPL.

3. DP&L fails to demonstrate the minimum amount that would be necessary to avoid an emergency

Even if an emergency is demonstrated, the Commission will authorize relief in an amount that is necessary under the circumstances to address the emergency. To that end, "the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency." *Akron Thermal*, Opinion and Order at 6. In its attempt

[9] *See ESP III*, Supplemental Post-Hearing Brief of Interstate Gas Supply, Inc. at 51 (May 15, 2019).

[10] *Id.*

to support its claim that ESP I passes the ESP versus MRO test, DP&L nonetheless has inflated the financial integrity charge that would be "necessary" to avert an emergency.

As in the aborted attempt to show an emergency, DP&L itself supplies the "evidence" to show that the financial integrity charge exceeds the amounts necessary to avert an emergency. According to DP&L, the RSC is necessary and will allow DP&L to maintain its credit rating at levels well-above the "ragged edge" of investment grade and pay substantial dividends to DPL. Malinak Testimony at 58. On the other hand, DP&L proposes an MRO surcharge that ranges from [redacted] than the RSC to accomplish roughly the same result or a little better. Malinak Testimony at 55. If the lower charge accomplishes the same results as the higher charge, there is no logical way the math can be bent to suggest that the financial integrity charge proposed by DP&L is the minimum amount necessary to avert an emergency.

In fact, however, the RSC itself would not be the baseline either. According to DP&L, even under a scenario in which it is recovering the RSC amounts through rates, it would have access to $300 million in additional equity funding from AES and would be paying dividends to DPL in excess of [redacted] Malinak Testimony at 58. To suggest that customers would pay emergency charges in excess of the RSC in an MRO to support a dividend while DP&L was allegedly in financial free-fall contradicts the long-held position of the Commission that the minimum necessary amount does not include a return on equity. *Akron Thermal,* Opinion and Order at 13. Thus, the amount by which the financial integrity charge proposed by DP&L exceeds that necessary to address the alleged emergency is far greater than the current RSC.

4. The business decisions of AES should not expose DP&L's retail customers and competitors to a financial integrity charge

Before granting emergency relief, the Commission must find that any increase is necessary to prevent injury to the interests of the public or of the public utility. R.C. 4909.16; *Akron Thermal*, Opinion and Order at 14. Propping up DPL, however, is not a legitimate public interest outcome that would justify a financial integrity charge.

The justification for the MRO charge in this case is simply a variation on a theme that DP&L has advanced since the AES merger: the "real problem" will be that DPL will not meet its heavy debt obligations unless DP&L customers fund dividends to DPL to meet its debt expense. Malinak Testimony at 51-52 and 62. The debt load that DPL is carrying in turn results in its lower credit rating. Although DP&L claims elsewhere that there is adequate ring fencing in place, in this case it states that DPL's lower credit rating adversely influences the rating of the otherwise healthy credit rating of DP&L.

DP&L's claim that it faces an emergency, therefore, rests on the Commission turning a blind eye to the fact that AES's business decision is driving the alleged emergency. Although DP&L gives little consideration to how it got to this position, the underlying cause of the supposed emergency is relevant to a decision whether the Commission would saddle an MRO with a financial integrity charge. *Akron Thermal*, Opinion and Order at 18. Because the debt load is largely what remains of the debt that AES pushed down to DPL when AES purchased DPL, the financial integrity charge would be a response to an AES business decision the consequences of which AES seeks to shift from its shareholders to the customers of DP&L. Approving a financial integrity charge to fix AES's self-inflicted wound is not sound public policy.

Moreover, this problem, if it exists, is one that AES has the means to address. Throughout its supporting testimony, DP&L notes that AES is prepared to make a $300 million equity infusion to assist DP&L, but only if the Commission goes along with AES's financial ambitions. Malinak Testimony at 10. This equity infusion will provide additional cash to allow DP&L to fix its aging distribution system and (in something that looks quite questionable) pay dividends to DPL. Malinak Testimony, Exhibit RJM-42A. Under an MRO, however, AES's equity infusion is cut in half, and DP&L is loaded with an additional [redacted] in debt. Malinak Testimony at 7. It is far-fetched to believe that the Commission would approve a financial integrity charge when to do so would once again place DP&L deeper in debt. Authorization of the charge is especially unlikely when AES would be withholding an equity infusion that could be used to address the alleged emergency at either of its subsidiaries.

Authorization of the charge also has adverse competitive consequences. While retail customers are bailing out AES, it avoids servicing fordebt that resulted from its poor choices. AES may therebyredirect its resources to other competitive activities. As a result, AES is in a better position to compete unfairly in several markets, including but not limited to deployment of large-scale fossil-based generation, energy storage, solar, and wind. Although dollars are fungible, the way they are used directly affects the state of competition in Ohio.

C. A charge to recover the costs to clean-up the Hutchings generation facility site is not lawful under an MRO

DP&L includes in its proposed MRO a charge of [redacted] for clean-up costs of the closed Hutchings generation plant. The inclusion of the charge is not a permitted adjustment of an MRO.

R.C. 4928.142(D) provides specific instruction on the price that DP&L would be permitted to charge in a "first application" for an MRO. The price would include a blend of the price of generation supply produced by the competitive bid process "and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric service price for the remaining standard service offer load." The latter component, the generation service price, can be "adjusted upward or downward as the commission determines is reasonable, relative to the jurisdictional portions of any known and measurable changes *from the level of any one or more of the following costs as reflected in that most recent standard service offer price*." (Emphasis added.) One of the adjustments that could be made to the generation price is for the electric distribution utility's "costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs." Thus, the adjustment is limited to the portion of MRO price related to the legacy generation price portion of the MRO price for environmental costs associated with electricity production to supply the standard service offer.

As DP&L notes in its supporting testimony, all generation supplied under the standard service offer is procured through the competitive bidding process. Given the source of the generation supply price, there would be no adjustment for known and measurable changes for environmental costs as reflected in that most recent standard service offer price. Whatever environmental costs exist are already embedded in the price of the competitively bid product.

Exclusion of these costs is also dictated by a consistent reading of the adjustments permitted by R.C. 4928.142(D). The permitted adjustments concern the "incurred cost of

fuel used to produce electricity," "prudently incurred purchased power costs," and portfolio requirements associated with the legacy generation service. Each is a component of the production costs or, in the case of the portfolio costs, associated with the generation service provided by the electric distribution utility. There is no room in these adjustments for including the cost of a facility that is not supplying generation service used for the standard service offer. Thus, a fair reading of the adjustments that may be made to the "generation service price" would exclude any clean-up costs for a closed generation plant such as Hutchings.[11]

In a lawful and reasonable calculation of the cost of an MRO, therefore, the Commission should reduce the MRO cost by [redacted]

D. An MRO without financial integrity and environmental charges is less expensive than ESP I

The preceding discussion simplifies the quantitative test applicable to ESP I. It demonstrates that an MRO that the Commission would approve would not include financial integrity and environmental charges.[12] The MRO and ESP I have the same generation cost since both are priced based on a competitive bidding process. DP&L, however, collects the RSC and additional charges under ESP I that increase the cost of

[11] Consider the alternative which is presented by DP&L: any generation-related environmental cost left on DP&L's books could in theory be passed through as an adjustment to the MRO, whether the facility is owned or has been disposed of by DP&L. Once a break from the express terms of the statute is authorized, the environmental claims are unlimited.

[12] In the decision reversing the distribution modernization rider the Commission authorized for the FirstEnergy Companies, the Supreme Court of Ohio cast considerable doubt on the Commission's determination that it could have properly authorized a financial integrity charge under R.C. 4928.142, but concluded that the issue was moot because it held that the authorization was unlawful. *In re Ohio Edison Co.*, 157 Ohio St. 3d 73, ¶ 37 (2019). The Court's discussion of the proper application of R.C. 4928.142 suggests an independent reason for removing the financial integrity charge from the ESP versus MRO quantitative test.

it relative to an MRO. Therefore, ESP I is worse than an MRO by at least $314 million (undiscounted) and fails the quantitative test.[13]

Corrected Exhibit RJM-28A and B: Estimate of ESP versus MRO Quantitative Test

(In Thousands; Undiscounted)

	2020	2021	2022	2023	Total
Rate Stabilization Charge	76,604	78,778	78,981	79,725	314,088
Less: Corrected Financial Integrity Charge	0	0	0	0	0
Less: Corrected Hutchings Clean-up Costs	0				0
Net Cost (Benefit) of ESP	78,624	80,799	78,981	79,725	314,088

V. THE ALLEGED QUALITATIVE BENEFITS OF ESP I ARE NEGLIGIBLE AND DO NOT OUTWEIGH THE DEAD-WEIGHT LOSS IT IMPOSES ON CUSTOMERS

DP&L also argues that ESP I has five qualitative benefits when compared to an MRO. Because ESP I fails the ESP versus MRO test by $314 million over the next four years, DP&L faces an uphill challenge demonstrating that the five alleged qualitative benefits are sufficient to justify extension of the plan. It fails this challenge because these claimed benefits are based on assertions that are contradicted by DP&L's Application and supporting testimony.

Initially, DP&L claims that the $300 million equity infusion from AES if the Commission approves the continuation of ESP I is a benefit to the ESP relative to an MRO. Malinak Testimony at 81. In an MRO (with a financial integrity charge), DP&L

[13] The ESP versus MRO tests presented by DP&L are set out in Malinak Testimony, Exhibits RJM-28A and RJM-28B. When corrected to remove the charges that could not be lawfully authorized in an MRO, the tables of the annual costs of ESP I in the Exhibits would be identical. Therefore, only one table is presented here.

would still be seeking [redacted] in new funding, but the funding would be in the form of debt. Malinak Testimony at 7. So the alleged benefit is that the Commission is held hostage to AES's financing decisions: AES is a beneficent dictator if the Commission capitulates, or AES returns to old habits and loads additional debt on one of its subsidiaries. This claimed benefit comes with too many strings attached for the Commission to find that ESP I is better in the aggregate.

The second alleged benefit is the possibility of refunds if DP&L over-earns. Malinak Testimony at 81. DP&L's financial projections, however, demonstrate that it believes that it will not exceed the significantly excessive earnings test ("SEET") at any time during the next four years if it remains subject to ESP I. Malinak Testimony at 88. Regardless, the SEET has proved to be one of the least effective constraints on electric distribution utilities; only one of the electric distribution utilities has found a way to over-earn at sufficient levels to be deemed to have violated the test, and it has not failed in most years since the test was statutorily adopted. Thus, the alleged benefit of possible refunds for SEET violations is an empty claim.

According to DP&L, retaining an ESP is inherently a benefit because it allows the Commission greater discretion than what an MRO would provide it. Malinak Testimony at 81. This third alleged benefit is probably the oddest. Essentially, this claim revolves around the additional rate flexibility the ESP statute provides. This claim, however, is based on ignoring the obvious. According to DP&L itself, the Commission can address these same kinds of issues in a properly filed rate case. This has to be the case since all distribution rate effects are treated as identical under an MRO and ESP I. Malinak

Testimony at 80. The only difference is regulatory lag, a problem that hurts the utility and changes nothing for the Commission.

The fourth claim is that the MRO with a financial integrity charge would lead to a death spiral for customers remaining on the standard service offer. This claim is wrong for several reasons. First, the claim begs the question whether a financial integrity charge could be warranted in the first place. Since the charge cannot be included as a term of an MRO, see discussion above, the assumption that the MRO would lead to a death spiral is based on a false premise. Second, DP&L assumes it would be permitted to impose a charge in the range it proposes and this high charge would trigger the death spiral. Based on the proper definition of what may be authorized in an emergency case, however, the range proposed by DP&L must be grossly overstated, as demonstrated by DP&L's own evidence. See discussion above. Third, the claim that customers would migrate in the face of a financial integrity charge is based on no evidence or study of the elasticity of demand whatsoever, despite the fact that DP&L has the burden of proof to demonstrate that ESP I is qualitatively better. R.C. 4928.143(E). Moreover, the Commission's experience with DP&L's attempts to measure customer migration suggests that those estimates be taken with a heavy dose of salt. *ESP II,* Opinion and Order at 25 (Sept. 3, 2013). In short, DP&L's claim that an MRO would be less favorable than ESP I because it would result in a death spiral is nothing more than unsupported clichés.

The fifth claimed benefit of ESP I is that it avoids rate shock since recovery of the cost of additional distribution plant is spread out. This claim is wrong in at least two ways. First, additions through a rider are themselves "lumpy" and unpredictable as they depend on the ability of DP&L to construct new plant. Second, customers may well be better off

even if the investment decisions over a set period were the same. Customers will pay for the prudent investments in rates either way; the difference is regulatory lag. Under normal inflationary expectations, customer dollars paid in future years are worth less than those paid out currently.[14] As measured from the customer's side of the transaction, the MRO is the better option.[15]

Apart from the five qualitative factors identified by DP&L, it also attempts to justify the current RSC and any financial integrity charge on the basis that DP&L suffers from a significant provider of last resort obligation. Malinak Testimony at 65-66. Even if that were true, the "cost" would be the same whether DP&L were operating under ESP I or an MRO; thus, it has no effect on the decision whether ESP I passes the ESP versus MRO test. Apart from its irrelevance to the decision presented in this matter, however, is that DP&L again has failed to demonstrate what costs it actually might incur to serve as provider of last resort. It admits that it has not provided an estimate of the cost. Malinak Testimony at 66.[16] Further, it ignores contract provisions that provide adequate assurance and permit other competitive bid winners to step into the shoes of any defaulting bidder to supply generation. See discussion of competitive bid contracts above. Finally, it ignores that DP&L has access to the PJM market, which is awash in generation resources, resources that have depressed both capacity and energy prices,

[14] "What are the Effects of Inflation on the Economy?" viewed at https://www.thebalance.com/what-are-the-effects-of-inflation-357607.

[15] Moreover, to the extent there is a risk of rate shock as a result of additions to distribution rate base for advanced metering investments, as alleged by DP&L, the "shock" could be addressed under R.C. 4905.31.

[16] The failure to provide any cost justification for the RSC as a provider of last resort charge raises anew whether there is a lawful basis for the charge. *In re Columbus S. Power Co.,* 128 Ohio St. 3d 512 ¶¶ 22-30 (2011) (authorization of provider of last resort charge based on insufficient record support reversed).

according to PJM. The suggestion that DP&L is incurring some real identifiable cost associated with being the provider of last resort that justifies a $314 million premium paid under the ESP has not been and cannot be demonstrated.

While DP&L goes to some lengths to identify the benefits of ESP I, it fails to address the benefits afforded the Commission and customers by an MRO. First, it would permanently afford customers the benefits of the competitive bidding process. The Commission has placed great store on that process in approving the move to pricing the standard service offer. *ESP II*, Opinion and Order at 50 (Sept. 4, 2013). Under an ESP, however, there is no guarantee that those benefits would be continued; a company could elect to supply the standard service offer through purchased power contracts as permitted by the statute if it could convince the Commission of the supposed benefits of doing so. R.C. 4928.143(B)(2)(a). Since an MRO is permanent, the benefits of a competitive bidding process could be made irrevocable. Second, customers would benefit from more stable prices. Currently, prices under an ESP are subject to several riders that frequently are updated. Under an MRO, DP&L would have considerably less freedom to load up the bill with frequently adjusted charges, a significant move toward more stable pricing for customers. Third, an MRO would reduce regulatory overhead for the Commission, DP&L, and other interested parties. ESP cases present a substantial drain on legal and technical resources that would be avoided under an MRO.

In summary, the five qualitative benefits are not worth much, and any actual differences such as the reduction of regulatory lag benefit only DP&L. Claims about a provider of last resort obligation are irrelevant and unsupported. Further, an MRO would provide qualitative benefits to customers and the Commission. Given the lack of apparent

value of ESP I when compared to an MRO, the alleged "qualitative" benefits do not provide a justification for saddling customers with an ESP that is quantitatively worse than an MRO by more than $314 million over the next four years.

VI. REMEDY: TRANSITION TO MRO

Because the ESP fails the test, the Commission should terminate the plan. When it ends ESP I, "[t]he commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative." R.C. 4928.143(E).

As a first step, the Commission should order DP&L to terminate billing and collection of the RSC and reject the imposition of a financial integrity charge because DP&L has not demonstrated that it faces a financial emergency that qualifies for rate relief under R.C. 4928.142(D)(4).

If the Commission determines that DP&L is entitled to some form of emergency relief, the Commission may adjust the "standard service offer price." Because the standard service offer price is a bypassable rate, any adjustment must remain bypassable. Such an approach would further the state policy in favor of customer choice and ensure that shopping customers are not saddled with the consequences of AES' decision to pay an excessive premium for DP&L—and to fund that premium with debt that AES pushed down to DPL—based upon an assumption of inflated generation-related returns that never materialized.

Additionally, the Commission should direct DP&L to wind down the other charges that are not available under an MRO so that legitimately incurred costs under the ESP

are not stranded, but this wind down should be completed within a term that does not extend unreasonably.

VII. CONCLUSION

DP&L is once again attempting to extend a non-cost-based charge, the thrice-approved RSC, to protect the credit ratings of DPL. There is no legal or reasoned basis for the Commission to acquiesce in this attempt. Accordingly, the Commission should conclude that ESP I is not better in the aggregate than MRO and terminate the plan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this *Initial Comments of Interstate Gas Supply, Inc.* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 1, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on the parties subscribed to this proceeding. Additionally, notice was provided to the parties listed below.

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